Swissray Asia Healthcare Co Ltd v V Medical Services M Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC) (A)-1479–08 OF 2022
CHE MOHD RUZIMA, MARIANA YAHYA AND COLLIN SEQUERAH JJCA
6 JUNE 2024

Civil Procedure — Injunction — Fortuna injunction — Applicable test — High Court allowed respondent's application for Fortuna injunction — Whether party who applied for Fortuna injunction on the grounds that debt was disputed required to show 'bona fide dispute' or to merely show that there existed 'prima facie dispute' given existence of arbitration clause — Whether there was bona fide dispute that existed — Whether respondent came to court with clean hands

Companies and Corporations — Winding up — Injunction to restrain petition — Fortuna injunction — Applicable test — Whether party who applied for Fortuna injunction on the grounds that debt was disputed required to show 'bona fide dispute' or to merely show that there existed 'prima facie dispute' given existence of arbitration clause — Whether there was bona fide dispute that existed — Whether respondent came to court with clean hands — Companies Act 2016 s 466(1)(a)

This was an appeal by the appellant against the decision of the learned judicial commissioner in allowing the respondent's application for Fortuna injunction to restrain the appellant from presenting a winding up petition against the respondent on the grounds that there existed disputed debt. The relevant fact that led to the present appeal was that the appellant alleged that the respondent, as the appellant's appointed distributor and pursuant to a distributorship agreement ('the DA'), purchased two medical devices for which remained due and owing. It ought to be noted that the DA contained an arbitration clause stating that all disputes should be referred to the arbitration in Switzerland. The respondent disputed the debt and refused to pay the balance of the purchase price premised upon the contention that the purchase order was issued in order to assist the appellant to deliver the machines to the end customer. The respondent alleged that there were matters that governed the relationship of parties extrinsic to the terms of the DA. The appellant on the other hand denied the existence of any extrinsic arrangements and argued that cl 26.9 of the DA superseded all contemporaneous and prior agreements and understandings related to the subject matter. The appellant further argued that

there was no bona fide dispute of the debt as the respondent had repeatedly acknowledged or admitted the debt. Thus, the argument of irreparable damage was irrelevant. The legal issue in the present appeal revolved around whether in the event a dispute arose between contracting parties who had chosen to resolve disputes through arbitration, and where one party issued a notice under s 466(1)(a) of the Companies Act 2016 against the party in alleged breach and the latter party applied for an injunction to restrain the filing of a winding up petition on the grounds that the debt was disputed, was the party in alleged breach required to show: (a) a 'bona fide dispute' (higher threshold test); or (b) to merely show that there existed a 'prima facie dispute' (lower threshold test), given the existence of an arbitration clause. The resolution of this question also involved the further question of whether the court was entitled to conduct an examination into the merits of the dispute.

Held, allowing the appeal and setting aside the Fortuna injunction ordered by the High Court with costs of RM15,000 to the appellant subject to allocator:

(1) It must be recollected that in the case of *Altomart Ltd v Salford Estates (No 2) Ltd* [2014] EWCA Civ 1575 (UK) ('Salford Estates') itself the injunction to restrain from an inquiry of a summary judgment type analysis was subject to there being an unadmitted debt on which the winding up petition was grounded upon. Further, it ought to be noted that the *Salford Estates*'s approach, even in pro-arbitration Singapore, was subject to the dispute not being raised as an abuse of the court's process. This could only translate into the position that the party applying for a Fortuna injunction must show the existence of a bona fide dispute and not merely a prima facie dispute even in the face of an arbitration clause. Therefore, the court was constrained to hold that it was the bona fide dispute test which was the applicable test when dealing with the question of whether to grant a Fortuna injunction in such circumstances. To hold otherwise would be to countenance the situation where frivolous disputes would be alleged just in order to stave off the presentation of a winding up petition when in fact there was no genuine dispute to the debt. This would also lead to an abuse of court process (see paras 59, 65–69 & 83–84).

(2) In as much as parties were to be held bound to an arbitration clause as a chosen mechanism for the resolution of their disputes, the parties must equally be held to the terms of the agreement that they had chosen to enter. It also axiomatic that matters such as the one under the court's consideration, were fact sensitive. The facts revealed that there were repeated acknowledgments of the debts after the email of 9 September 2016 and also the arrangement reached between the parties during the meeting at Cititel, Midvalley. Notwithstanding the above, it still of course did not behove the courts to indulge in a minute examination of the merits of any dispute, but where the circumstances of the case clearly

indicated, as in the present case, that there had been unequivocal admissions as to the sum due and owing, not much in the way of an examination needed to take place anyway (see paras 73–74 & 76).

(3) The origins of the Fortuna injunction were equitable in nature, as such, the maxims of equity would apply, including that of coming to the court with clean hands. The respondent refused to make payment of the balance price premised upon the allegation that the purchase order was issued in order to assist the appellant to deliver the machines to the end customer which in effect meant that the said purchase order was a sham document created by the respondent in order to deceive and mislead the relevant authorities. The very nature of the allegation by the respondent would disentitle them to the grant of the Fortuna injunction (see paras 77–79).

(4) The court agreed with the appellant that in taking the position that they have taken, the respondent had both approbated and reprobated. They did this by on the one hand, contending that their contractual relationship was not governed by the DA but by extrinsic matters including parties' course of conduct, while on the other hand, placing reliance on the arbitration clause in asserting the existence of a dispute (see paras 86–87).

(5) The respondent's assertion that there were matters that governed the relationship of parties extrinsic to the terms of the DA flew in the face of the entire agreement clause in cl 26.9 of the DA. The chronology of events that prompted the respondent to make payment of certain sums of money to the appellant along with unequivocal admissions of the sums owed, was pursuant to a meeting between the parties at the Cititel Midvalley, Kuala Lumpur. The respondent's allegation stating that there were disputes in the form of matters extrinsic to the four corners of the DA were only raised after the presentation of the winding up petition by the appellant and therefore could not be said to have been in good faith. The nature of some of the 'disputes' raised the question of whether the respondent had come to seek equity's aid with tainted motives or with hands that were not clean. Under all the circumstances of the case, the court therefore held that there was no bona fide dispute that existed (see paras 80–82 & 88–93).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap keputusan pesuruhjaya kehakiman yang bijaksana yang membenarkan permohonan responden untuk injunksi Fortuna untuk menghalang perayu daripada mengemukakan petisyen penggulungan terhadap responden atas alasan wujud hutang yang dipertikaikan. Fakta relevan yang membawa kepada rayuan semasa ialah perayu mendakwa bahawa responden, sebagai pengedar yang dilantik oleh

perayu dan menurut perjanjian pengedaran ('DA tersebut'), membeli dua peranti perubatan yang masih belum dibayar dan terhutang. Perlu diingatkan bahawa DA tersebut mengandungi klausa timbang tara yang menyatakan bahawa semua pertikaian harus dirujuk kepada timbang tara di Switzerland. Responden mempertikaikan hutang tersebut dan enggan membayar baki harga belian atas alasan bahawa pesanan pembelian dikeluarkan untuk membantu perayu menghantar mesin-mesin tersebut kepada pelanggan akhir. Responden mendakwa terdapat perkara-perkata ekstrinsik kepada syarat-syarat DA tersebut yang mengawal hubungan pihak-pihak. Perayu sebaliknya menafikan kewujudan apa-apa pengaturan ekstrinsik dan berhujah bahawa klausa 26.9 DA tersebut menggantikan semua perjanjian dan pemahaman sezaman dan terdahulu yang berkaitan dengan perkara subjek. Perayu seterusnya berhujah bahawa tiada pertikaian bona fide ke atas hutang tersebut kerana responden telah berulang kali menerima atau mengakui hutang tersebut. Oleh itu, hujah kerosakan yang tidak boleh diperbaiki adalah tidak relevan. Isu undang-undang dalam rayuan ini berkisar tentang sama ada sekiranya pertikaian timbul antara pihak-pihak yang berkontrak yang telah memilih untuk menyelesaikan pertikaian melalui timbang tara, dan apabila satu pihak mengeluarkan notis di bawah s 466(1)(a) Akta Syarikat 2016 terhadap pihak yang didakwa membuat pelanggaran dan pihak yang didakwa membuat pelanggaran memohon injunksi untuk menghalang pemfailan petisyen penggulungan atas alasan hutang tersebut dipertikaikan, adakah pihak yang didakwa membuat pelanggaran tersebut dikehendaki menunjukkan: (a) 'pertikaian bona fide' (ujian ambang yang lebih tinggi); atau (b) untuk sekadar menunjukkan bahawa wujud 'pertikaian prima facie' (ujian ambang lebih rendah), memandangkan wujudnya klausa timbang tara. Penyelesaian soalan ini juga melibatkan persoalan lanjut sama ada mahkamah berhak menjalankan pemeriksaan terhadap merit pertikaian tersebut.

Diputuskan, membenarkan rayuan dan mengenepikan injunksi Fortuna yang diperintahkan oleh Mahkamah Tinggi dengan kos RM15,000 kepada perayu tertakluk kepada alokator:

(1) Perlu diingat bahawa dalam kes *Altomart Ltd v Salford Estates (No 2) Ltd* [2014] EWCA Civ 1575 (UK) ('Salford Estates') itu sendiri, injunksi untuk menghalang penyiasatan ke atas analisis jenis penghakiman terus adalah tertakluk kepada terdapat hutang yang tidak diakui di mana petisyen penggulungan itu berasaskan. Selanjutnya, perlu diperhatikan bahawa pendekatan *Salford Estates*, walaupun dalam Singapura yang pro-timbangtara, tertakluk kepada pertikaian yang tidak dibangkitkan sebagai penyalahgunaan proses mahkamah. Ini hanya boleh diterjemahkan ke dalam pendirian bahawa pihak yang memohon injunksi Fortuna mesti menunjukkan kewujudan pertikaian bona fide dan bukan semata-mata pertikaian prima facie walaupun dalam kewujudan klausa timbang tara. Oleh itu, mahkamah tiada pilihan lain

selain memutuskan bahawa ujian pertikaian bona fide adalah ujian yang terpakai apabila menangani persoalan sama ada untuk memberikan injunksi Fortuna dalam keadaan sedemikian. Untuk memutuskan sebaliknya adalah untuk menyokong situasi di mana pertikaian remeh akan dibangktikan hanya untuk menghalang pengemukaan petisyen penggulungan sedangkan sebenarnya tidak ada pertikaian tulen terhadap hutang tersebut. Ini juga akan membawa kepada penyalahgunaan proses mahkamah (lihat perenggan 59, 65–69 & 83–84).

(2) Walaupun pihak-pihak terikat kepada klausa timbang tara sebagai mekanisme yang dipilih untuk penyelesaian pertikaian mereka, pihak-pihak perlu juga berpegang kepada terma-terma perjanjian yang telah mereka pilih untuk masuki. Ia juga tidak dapat disangkal bahawa perkara-perkara seperti yang di bawah pertimbangan mahkamah sekarang adalah sensitif kepada fakta. Fakta mendedahkan bahawa terdapat pengakuan berulang mengenai hutang tersebut selepas e-mel pada 9 September 2016 dan juga persetujuan yang dicapai antara pihak-pihak semasa mesyuarat di Cititel, Midvalley. Walau apa pun perkara-perkara di atas, ia sudah tentu tidak memerlukan mahkamah untuk melakukan pemeriksaan minit ke atas merit apa-apa pertikaian, tetapi jika keadaan kes tersebut dengan jelas menunjukkan, seperti dalam kes semasa, bahawa terdapat pengakuan yang tidak berbelah bahagi tentang jumlah yang kena dibayar dan terhutang, tiada pemeriksaan yang banyak yang perlu dilakukan (lihat perenggan 73–74 & 76).

(3) Asal-usul injunksi Fortuna adalah bersifat saksama, oleh itu, maksim kesaksamaan akan terpakai, termasuk maksim tentang datang ke mahkamah dengan tangan yang bersih. Responden enggan membuat pembayaran harga baki berdasarkan dakwaan bahawa pesanan belian dikeluarkan untuk membantu perayu menghantar mesin-mesin tersebut kepada pelanggan akhir yang bermaksud pesanan pembelian tersebut adalah dokumen palsu yang dicipta oleh responden untuk memperdaya dan mengelirukan pihak berkuasa yang berkenaan. Sifat dakwaan oleh responden itu sendiri akan menyebabkan mereka tidak berhak menerima pemberian injunksi Fortuna (lihat perenggan 77–79).

(4) Mahkamah bersetuju dengan perayu bahawa dalam mengambil pendirian yang telah mereka ambil, responden telah 'approbated and reprobated'. Mereka melakukan ini dengan mendakwa pada mulanya bahawa hubungan kontrak mereka tidak dikawal oleh DA tersebut tetapi oleh perkara-perkara ekstrinsik termasuk perlakuan pihak-pihak,

tetapi kemudiannya, mereka meletakkan pergantungan pada klausa timbang tara dalam menegaskan wujudnya pertikaian (lihat perenggan 86–87).

(5) Penegasan responden bahawa terdapat perkara-perkara ekstrinsik kepada syarat-syarat DA yang mengawal hubungan pihak-pihak adalah bertentangan dengan klausa keseluruhan perjanjian dalam klausa 26.9 DA tersebut. Kronologi peristiwa yang mendorong responden membuat pembayaran sejumlah wang tertentu kepada perayu bersama-sama dengan pengakuan tidak berbelah bahagi jumlah terhutang, adalah berdasarkan pertemuan antara pihak-pihak di Cititel Midvalley, Kuala Lumpur. Dakwaan responden yang menyatakan bahawa terdapat pertikaian dalam bentuk perkara-perkara ekstrinsik kepada kandungan DA tersebut hanya dibangkitkan selepas pengemukaan petisyen penggulungan oleh perayu dan oleh itu dakwaan tersebut tidak boleh dikatakan dibuat dengan suci hati. Sifat beberapa 'pertikaian' tersebut menimbulkan persoalan sama ada responden datang untuk mendapatkan bantuan kesaksamaan dengan motif tercemar atau dengan tangan yang tidak bersih. Di bawah semua keadaan kes tersebut, mahkamah memutuskan bahawa tidak ada pertikaian bona fide yang wujud (lihat perenggan 80–82 & 88–93).]

Cases referred to

Altomart Ltd v Salford Estates (No 2) Ltd [2014] EWCA Civ 1575, CA (refd)
AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co) [2020] 1 SLR 1158; [2020] SGCA 33, CA (refd)
Awangsa Bina Sdn Bhd v Mayland Avenue Sdn Bhd [2019] MLJU 1365; [2019] 1 LNS 590, HC (refd)
BDG v BDH [2016] 5 SLR 977, HC (refd)
Fortuna Holdings Pty Ltd v The Deputy Federal Commissioner of Taxation [1978] VR 83, SC (refd)
Lasmos Ltd v Southwest Pacific Bauxite (HK) Ltd [2018] HKCU 702; [2018] HKCFI 426; [2018] 2 HKLRD 449 (refd)
Megasteel Sdn Bhd (No Syarikat 181104-T) v Perwaja Steel Sdn Bhd (No Syarikat 187922) [2008] MLJU 252; [2008] 4 CLJ 352, CA (refd)
Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd [2007] 3 MLJ 316, CA (refd)
Pacific & Orient Insurance Co Bhd v Muniammah Muniandy [2010] MLJU 2217; [2011] 1 CLJ 947, CA (refd)
Tan Kok Tong v Hoe Hong Trading Co Sdn Bhd [2007] 4 MLJ 355, CA (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 218
Companies Act 2016 s 466(1)(a)
Medical Device Act 2012

Appeal from: *V Medical Services M Sdn Bhd v Swissray Asia Healthcare Co Ltd* [2023] 7 MLJ 155 (High Court, Kuala Lumpur)

Aawaisha a/p Steven Asokan Pillai (with Chuah Jo-Shua) (Zaid Ibrahim & Co) for the appellant.

Eugene Jayaraj (with David Soosay and Alani Farhah) (Haris Ibrahim Kandiah Partnership) for the respondent.

Collin Sequerah JCA:

INTRODUCTION

[1] The appellant who was the defendant in the High Court filed this appeal against the decision of the learned judicial commissioner given on 6 July 2022 in allowing the respondent/plaintiffs application by way of an originating summons to restrain the appellant from presenting a winding up petition against the appellant on the grounds that there existed a disputed debt.

[2] The background factual matrix that led to this appeal is that the appellant alleged that the respondent, as its appointed distributor and pursuant to a distributorship agreement, purchased two medical devices for which payment remains due and owing.

[3] The respondent, on the other hand, contends that there was no such purchase as alleged as there were certain other terms and conditions based upon the representations and understandings reached between the parties which went unfulfilled and hence disputed that they owed the sum claimed.

[4] The legal issue in this appeal revolves around whether in the event a dispute arises between contracting parties who have chosen to resolve disputes through arbitration, and where one party issues a notice under s 466(1)(a) of the Companies Act 2016 against the party in alleged breach and the latter party applies for an injunction to restrain the filing of a winding up petition on the grounds that the debt is disputed, is the party in alleged breach required to show:

(a) a 'bona fide dispute' (higher threshold test); or

(b) to merely show that there exists a 'prima facie dispute' (lower threshold test) given the existence of an arbitration clause?

[5] The injunction to restrain the filing of a winding up application pursuant to s 466(1)(a) of the Companies Act 2016 is commonly known as a Fortuna injunction after the name of the case which bears its name.

FACTUAL MATRIX

[6] The pertinent facts which transpired that led to the above legal question arising is as hereinafter set out.

[7] The respondent is a Malaysian company whilst the appellant is a foreign company incorporated in Taiwan.

[8] The respondent and the appellant entered into a distributorship agreement ('DA') between the parties effective from 1 April 2016, for a period of three years for medical machines under the brand name of 'Novadaq'.

[9] The DA contained an arbitration clause that stipulated that all disputes in connection with the DA shall be referred to arbitration in Switzerland and in accordance with the Swiss rules of International Arbitration.

[10] Pursuant to the appellant's quotation and the respondent's order, on 24 May 2016, the respondent received the two medical machines which were delivered to the University Malaya Medical Centre ('UMMC').

[11] A dispute arose between the parties when the appellant demanded for the alleged debt. Due to non-payment, the appellant terminated the DA through its letter dated 30 August 2017.

[12] Discussions between parties were held but failed to bring a resolution to the dispute. The appellant contended a settlement was arrived at, and when no payments were made except for a sum of USD20,000 paid in December 2017, through their solicitors in Taiwan, they issued a second notice of demand dated 12 February 2020 to the respondent.

[13] When this notice of demand went unheeded, the statutory notice of demand was sent but again to no avail.

[14] The respondent then filed an originating summons ('OS') to restrain the appellant from presenting a winding up petition against it on the grounds that there existed a disputed debt where no award or final judgment was obtained.

[15] The High Court on 6 July 2022 allowed the Fortuna injunction applied for by the respondent. Hence this appeal.

A SUMMARY OF PARTIES POSITIONS

To place matters in perspective and for contextual purposes it is perhaps best to outline the arguments of the respondent's first.

B *The respondent*

[16] The respondent contends that the statutory notice of demand issued by the appellant is based on a debt disputed on substantial grounds, namely, the two medical machines were not actually 'purchased' by the respondent, the C purchase order being issued merely to assist the appellant to deliver the machines to the end-user and the said machines were only meant for demonstration and promotional purposes (ie demonstration units).

D **[17]** It was argued by the respondent that such agreement was based on representations emanating from the appellant's representatives and the understanding was that only in the event UMMC places a confirmed order, as well as upon registration of the medical machines under the Medical Device Act 2012, were the terms of the DA to be considered as applicable.

E

[18] It was the respondent's contention that these agreements and understanding were subsequent conduct after the execution of the DA which varied the DA and as such, the parole evidence rule do not apply, neither does the entire agreement clause in cl 26.9 of the DA.

F

[19] In order to bolster their arguments, the respondent argued that cl 4.3 DA read with item 4 of Annex D of the DA states that for 'each purchase order', the plaintiff is to pay '100% of the purchase price within 30 days of acceptance G of the purchase order' either by wire transfer or by irrevocable letter of credit 'prior to the shipment'. However, the terms of the purchase order were 'Payment #1 = 10% deposit ...'

[20] Thus, it was alleged by the respondent, the payment terms differed.

H

[21] It was further argued that the appellant paid for the shipping costs, freight charges and insurance in respect of the delivery of the two medical machines although item 8.2 Annex D of the DA states that these costs are at the respondent's 'own costs and risk'.

I

[22] The appellant only issued a performa invoice dated 13 May 2016 expressly stating it was meant for the use of 'customs purpose only'. The

purported actual invoice back-dated to 26 May 2016, was only issued on 30 July 2017 ie, one year and five months after the delivery and issuance of the performa invoice.

[23] The respondent finally argued that after the execution of the DA and the issuance of the performa invoice, the appellant sought payment of the 10% deposit and had not insisted on the 100% payment term.

[24] The respondent thus argued that there were variations of the terms of the DA and/or a collateral contract in respect of the two medical devices based upon the conduct of parties.

[25] The respondent said that as a result of the appellant's act of terminating the contract in August 2017, they have incurred financial loss.

[26] As a result of the matters contended for above, there exists a substantial bona fide dispute which, according to the terms of the DA, is to be determined by way of arbitration.

[27] The respondent submitted that the proper test to be applied for in the grant of a 'Fortuna injunction' where there is an arbitration agreement or clause (or otherwise an agreement for parties to refer their dispute to arbitration) is for the applicant to establish a prima facie dispute that the debt fell within the arbitration agreement/clause ('the lower threshold prima facie test').

[28] In support thereof, a number of authorities were cited, principally the case of *Altomart Ltd v Salford Estates (No 2) Ltd* [2014] EWCA Civ 1575 (UK).

[29] The respondent thus submitted that they have crossed the threshold in showing that the dispute regarding the DA fell within the arbitration clause.

The appellant

[30] The appellant contended that the transaction between it and the respondent is a simple sale and purchase of the minimum number of required purchase of machines in accordance with the terms of the DA to which the respondent is bound by its plain terms.

[31] The appellants submitted that there were no extrinsic arrangements and/or negotiations outside the terms of the DA as alleged. To the contrary, it was argued, cl 26.9 of the DA stipulates that the DA supersedes all contemporaneous and prior agreements and understandings related to the subject matter.

[32] It was also argued that there is no bona fide dispute of the debt and the respondent had repeatedly acknowledged or admitted the debt. Thus, the argument of irreparable damage is irrelevant.

[33] The appellant finally submitted that the respondent did not come to court with clean hands and has refused to pay the balance price, by alleging that the purchase order was issued to assist the appellant to deliver the machines to the end customer, which was denied, in effect means the purchase order is a sham document created by the respondent to mislead the various authorities.

[34] The appellant therefore submitted that they were entitled to issue the statutory demand for non-payment.

[35] It was also submitted that for the respondent to succeed in their quest for a Fortuna injunction, they must fulfill the ('higher threshold') test of establishing a bona fide dispute.

ANALYSIS AND FINDINGS

[36] The resolution of the instant dispute depends upon the correct legal test to be applied in the circumstances already outlined earlier.

[37] The question simply put is this. Is the proper test to be used when one party presents a statutory demand notice pursuant to s 466(1)(a) of the Companies Act 2016 for a debt due and owing and in response the other party applies for a Fortuna injunction to stay or to restrain the winding up petition and where there exists an arbitration clause governing the contract between parties, the prima facie dispute test or the bona fide dispute test?

[38] The resolution of this question also involves the further question of whether the court is entitled to conduct an examination into the merits of the dispute.

[39] Before embarking on an analysis on these issues, it is pertinent to set out the law applicable to the grant of Fortuna injunctions.

[40] There were two principles as set out in *Fortuna Holdings Pty Ltd v The Deputy Federal Commissioner of Taxation* [1978] VR 83 for the grant of the injunction which are:

(a) where the presentation of a winding up petition which has no chance of success as a matter of law and fact, might produce irreparable damage to the company ('the first Fortuna principle'); and

(b) where the party seeking to present the winding up petition chooses to

assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure ('the second Fortuna principle'). A

[41] These principles were applied and followed by the Malaysian Court of Appeal cases of *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316 and three years later in *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 CLJ 947 respectively. B

[42] In *Tan Kok Tong v Hoe Hong Trading Co Sdn Bhd* [2007] 4 MLJ 355, the Court of Appeal held that when deciding whether to grant an injunction to restrain a petition that is based on a statutory demand for a debt, the court must be satisfied that the debt is bona fide disputed on substantial grounds. C

[43] The facts of the case are of itself rather unremarkable and need not detain us further. Suffice to state that it involved the defendant advancing amounts in excess of RM1m to the plaintiff. D

[44] When the defendant's demand went unheeded, the defendant issued a notice under the then s 218 of the then Companies Act 1965 after which the plaintiff then moved by ex parte and obtained an interim injunction to restrain the presentation of the winding up. E

[45] In dismissing the appeal against the order of the High Court judge in granting the injunction, the Court of Appeal speaking through Gopal Sri Ram JCA (as he then was), had discussed the jurisdiction of the courts in this area of law in the following terms: F

> *Every court has inherent jurisdiction to prevent an abuse of its process. It is a jurisdiction that is essential to ensure that the court's process is not used for a collateral purpose;* that is to say for a purpose other than to obtain redress for a genuine grievance. This court has recognised that jurisdiction on more than one occasion. G
>
> ...
>
> *When a court exercises its discretion to issue an injunction to restrain the presentation of a winding up, it exercises its inherent jurisdiction. It does so in order to prevent an abuse of its process. In Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation* [1978] VR 83, *McGarvie J put the point as follows*: H
>
> *When a court restrains the presentation of a winding up petition to that court it exercises part of its inherent jurisdiction to prevent abuse of its process. Mann v Goldstein* [1968] 1 WLR 1091, at pp 1093-4; [1968] 2 All ER 769. Usually a court acts against abuse of its process after proceedings have been commenced. Thus, existing proceedings may be stayed or dismissed, or documents delivered as a step in the proceedings may be struck out. This is done to relieve a party to the proceedings from an oppressive and damaging situation in which he has been placed through abuse of court process. I

> *The law has long recognized that with proceedings to wind up a company, intervention after the commencement of proceedings would often be too late to relieve the company of oppression and damage. The courts have recognized that irreparable damage may be done to a company merely through public knowledge of the presentation of a petition*. Usually the damage flows from the loss of commercial reputation which results. The courts have also been conscious of the pressure which may be put on a company, by a person with a disputed claim against it, threatening to present a winding up petition unless the company meets his claim. While that threat exists, the company, in order to avoid the damage involved in the presentation of a petition, is pressed to meet the claim although it may have substantial and genuine grounds for regarding itself as not required to do so.
>
> The decisions of the courts have established the principle that the presentation of a winding up petition maybe restrained by injunction where its presentation would amount to an abuse of the process of the court. The courts apply this principle similarly to restrain the advertisement of a petition already presented. The principle enables companies to be protected from threatened or apprehended oppression and damage from abuse of court process.
>
> *When deciding whether to grant an injunction to restrain a petition that is based on a statutory demand for a debt, the court must be satisfied that the debt is bona fide disputed on substantial grounds* (see *Stonegate Securities Ltd v Gregory* [1980] 1 All ER 241). It is not enough that there is a serious question to be tried. In other words, this is one of those cases to which the general test laid down in *American Cynamid Co v Ethicon Ltd* [1975] AC 396 does not apply. (Emphasis added.)

[46] A few propositions can be gleaned from the above passage as follows:

(a) when a court exercises its discretion to issue an injunction to restrain the presentation of a winding up, it exercises its inherent jurisdiction;

(b) part of this inherent jurisdiction is to prevent abuse of the courts process; and

(c) when deciding whether to grant an injunction to restrain a petition that is based on a statutory demand for a debt, the court must be satisfied that the debt is bona fide disputed on substantial grounds.

[47] Granted that the inherent jurisdiction referred to in the judgment refers to a situation where the party petitioning for a winding up may be using it as an instrument of oppression (and hence abuse of process) and where in the final analysis the act of presenting the winding up petition itself may result in irreparable harm to the debtor.

[48] Having said all of that, ought not the principle to work both ways?

[49] So, for example, ought not a debtor who has made unequivocal admissions to a debt, be held equally guilty of abusing the courts process when

he raises as a mere mantra the war cry that he disputes the debt when in fact there is no dispute or no substantial dispute to the debt?

[50] There have been no doubt developments of the law in this area and these have been alluded to and admirably dealt with by the learned High Court judge in her grounds of judgment.

[51] These developments relate to disputed debts governed by the existence of an arbitration agreement between the contesting parties.

[52] The first in the series is the English Court of Appeal in 2014 in its decision in *Altomart Ltd v Salford Estates (No 2) Ltd*, which held that the test to be applied in respect of a disputed debt governed by an arbitration agreement ought to be lowered, and that, the English courts when faced with a disputed debt that was subject to an arbitration agreement, ought to dismiss or stay the winding up application, save in 'wholly exceptional circumstances' which the judge found 'difficult to envisage'.

[53] It is thus suggested that when faced with an arbitration clause, the courts ought to adopt a lower threshold test when deciding whether to grant a Fortuna injunction or not.

[54] In the course of delivering the decision, the English Court of Appeal in *Salford* stated:

> Henry and Swinton Thomas LJJ considered in *Halki Shipping Corporation v Sopex Oils Ltd (The Halki)* [1998] 1 WLR 726 that the intention of the legislature in enacting the 1996 Act was to exclude the court's jurisdiction to give summary judgment, which had not previously been excluded under the Arbitration Act 1975. *It would be anomalous, in the circumstances, for the Companies' Court to conduct a summary judgment type analysis of liability for an unadmitted debt, on which a winding up petition is grounded, when the creditor has agreed to refer any dispute relating to the debt to arbitration*. Exercise of the discretion otherwise than consistently with the policy underlying the 1996 Act would inevitably encourage parties to an arbitration agreement — as a standard tactic — to bypass the arbitration agreement and the 1996 Act by presenting a winding up petition. (Emphasis added.)

[55] The argument thus formulated is that the court ought to refrain from conducting an inquiry of a summary judgment nature in circumstances where a dispute arises between parties who have contractually bound themselves to refer such dispute to arbitration.

[56] So, then the question needs to be asked whether in such circumstances the judges are to throw up their hands in the air in abject surrender and say'

there is an arbitration clause here so we have no business determining if the dispute raised is genuine or bona fide, let the parties contest it in arbitration'?

[57] To lend credence to such a view would be in effect tantamount to saying that in the face of an arbitration clause, the judges are to abdicate their responsibility and refrain altogether from inquiring into the genuineness of the dispute.

[58] Whither then the courts inherent jurisdiction to prevent abuse of courts process spoken of in the *Fortuna* case and in *Tan Kok Tong*.

[59] It must be recollected that in the *Salford* case itself the injunction to restrain from an inquiry of a summary judgment type analysis was subject to there being an unadmitted debt on which the winding up petition was grounded upon.

[60] Where on the other hand, the debt is unequivocally admitted, are the courts hands similarly tied? I venture to say 'I think not'.

[61] Developments in the law, notably in Singapore in the case of *BDG v BDH* [2016] 5 SLR 977 and in Hong Kong in *Lasmos Ltd v Southwest Pacific Bauxite (HK) Ltd* [2018] HKCU 702; [2018] HKCFI 426; [2018] 2 HKLRD 449 (Hong Kong) and at home in *Awangsa Bina Sdn Bhd v Mayland Avenue Sdn Bhd* [2019] MLJU 1365; [2019] 1 LNS 590 were relied upon and adopted by the learned High Court judge in holding that there existed a prima facie case that the dispute regarding the DA fell within the arbitration clause and so the Fortuna injunction should issue.

[62] The decision in *BDG v BDH* in Singapore was predicated upon a pro-arbitration policy in that country. Aedit Abdullah JC (as he then was) applied the lower prima facie standard and held that a dispute existed whenever a claim by one side was asserted to be disputed or denied by the other.

[63] The learned JC found that there was no need to go into the merits of the respective parties' claims, and he found that the plaintiff-company had successfully established a prime facie case that: (a) a dispute existed; (b) it had complied with the requirements of the tiered dispute resolution clause; and (c) such dispute fell within the scope of the arbitration clause and granted the injunction against the defendant-creditor.

[64] The Court of Appeal of Singapore in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158; [2020] SGCA 33 considered the standard of review in respect of a winding up petition based on

a debt, which was the subject of an arbitration agreement and held:

> 217 after a survey of the developments across various jurisdictions since *Salford Estates* was decided, followed the *Salford Estates* approach, concluding at [56] that winding up proceedings would be stayed or dismissed 'as long as (a) there is a valid arbitration agreement between the parties; and (b) the dispute falls within the scope of the arbitration agreement, *provided that the dispute is not being raised by the debtor in abuse of the court's process*';
>
> 21.2 opined at [94]-[100] that the 'wholly exceptional circumstances' exclusion was too exacting a standard, and instead, imposed the 'abuse of the court's process' exclusion instead. (Emphasis added.)

[65] It is to be noted that the *Salford Estates* approach even in pro-arbitration Singapore is subject to the dispute not being raised as an abuse of the court's process.

[66] This can only translate into the position that the party applying for a Fortuna injunction must show the existence of a bona fide dispute and not merely a prima facie dispute even in the face of an arbitration clause.

[67] We are constrained therefore to hold that it is the bona fide dispute test which is the applicable test to be applied when dealing with the question of whether to grant a Fortuna injunction in such circumstances.

[68] To hold otherwise would be to countenance the situation where frivolous disputes will be alleged just in order to stave off the presentation of a winding up petition when in fact there is no genuine dispute to the debt.

[69] This would also lead to an abuse of court process.

[70] This approach would also be more in keeping with the jurisprudence adopted by Gopal Sri Ram JCA (as he then was) in *Megasteel Sdn Bhd (No Syarikat 181104-T) v Perwaja Steel Sdn Bhd (No Syarikat 187922)* [2008] MLJU 252; [2008] 4 CLJ 352 where it was held that a creditor need not have obtained a judgment in order to present a winding up petition.

[71] If a petitioning party for a winding up therefore can thus petition on the strength of a debt asserted as owing to them in the absence of a judgment, it makes no sense for the party applying to restrain or to stay a winding up petition to merely assert that the debt is disputed on a lower threshold prima facie test without being able to withstand curial scrutiny of whether such assertion is bona fide or not.

[72] The mere assertion of the existence of an arbitration clause cannot

simply be recited as if it is some mechanical mantra in order to evade what would otherwise be a legitimate claim to a debt due and owing.

[73] In as much as parties are to be held bound to an arbitration clause as a chosen mechanism for the resolution of their disputes, the parties must equally be held to the terms of the agreement that they have chosen to enter.

[74] It also axiomatic that matters such as the one under consideration, are fact sensitive. The facts reveal that there were repeated acknowledgments of the debts after the email of 9 September 2016 and also the arrangement reached between the parties during the meeting at Cititel, Midvalley.

[75] We also agree with the submission advanced by learned counsel for the appellant that unlike the instant case, in both *Awangsa Bina Sdn Bhd* and *BDG v BDH*, one of the parties had already referred the disputes to arbitration thus asserting the bona fide nature of the dispute.

[76] Notwithstanding the above, it still of course does not behove the courts to indulge in a minute examination of the merits of any dispute, but where the circumstances of the case clearly indicate, as in the present case, that there have been unequivocal admissions as to the sum due and owing, not much in the way of an examination needs to take place anyway.

[77] It is also pertinent to remember that like all other forms of injunction, the origins of the Fortuna injunction are equitable in nature. This also means like all other equitable remedies; the maxims of equity will apply including that of coming to the court with clean hands.

[78] The respondent refused to make payment of the balance price premised upon the allegation that the purchase order was issued in order to assist the appellant to deliver the machines to the end customer which in effect meant that the said purchase order was a sham document created by the respondent in order to deceive and mislead the relevant authorities.

[79] This allegation was not surprisingly, denied by the appellant. The very nature of the allegation by the respondent would disentitle them to the grant of the Fortuna injunction.

[80] It is to be noted here that the respondent only asserted the fact ('dispute') that the two machines were actually meant as demo units after the presentation of the winding up petition.

[81] It is not in dispute that this nowhere formed any part of the terms of the

DA. It was alleged that these were matters extrinsic to the DA which were known and agreed by the parties.

[82] This flies in the face of the entire agreement clause contained in cl 26.9 of the DA. Under all the circumstances therefore, the respondent had not come with clean hands thus disentitling them, at the risk of repetition, to the grant of an equitable injunction.

[83] The phrase ('dispute') therefore has to refer to a genuine or a bona fide dispute if the court process is not to be abused.

[84] To countenance the lower threshold test advocated by *Salford Estates*, would open the door to parties in breach of their contractual obligations subjecting the system to abuse by the mere assertion of a dispute no matter how frivolous in nature, just in order to derail or to defeat the legitimate presentation of a winding up petition and in so doing, abuse the process.

[85] This avenue also would not be in the bests interests of oiling the machinery of the wheels of commerce that very much depend upon parties honouring the contractual bargain made between them

[86] We also further agree with the submission of learned counsel for the appellant that in taking the position that they have taken, the respondent had both aprobated and reprobated.

[87] They did this by on the one hand, contending that their contractual relationship was not governed by the DA but by extrinsic matters including parties' course of conduct, while on the other hand, placing reliance on the arbitration clause in asserting the existence of a dispute.

[88] In order to revert to the facts of the instant case and to recapitulate, the respondent here asserted that there were matters that governed the relationship of parties extrinsic to the terms of the DA.

[89] That however, flew in the face of the entire agreement clause in cl 26.9 of the DA.

[90] At the risk of repetition, the chronology of events that prompted the respondent to make payment of certain sums of money to the appellant along with unequivocal admissions of the sums owed, was pursuant to a meeting between the parties at the Cititel Midvalley, Kuala Lumpur.

[91] The allegations of there existing disputes in the form of matters

extrinsic to the four corners of the DA were only raised after the presentation of the winding up petition by the appellant and therefore cannot be said to have been in good faith.

[92] The nature of some of the 'disputes' raised the question of whether or not the respondent had come to seek equity's aid with tainted motives or with hands that were not clean.

[93] Under all the circumstances of the case, we therefore held that there was no bona fide dispute that existed.

[94] In the premises and for the reasons stated above, we unanimously allowed the appeal and set aside the Fortuna injunction ordered by the High Court with costs of RM15,000 to the appellant subject to allocator.

Appeal allowed; Fortuna injunction ordered by High Court set aside with costs of RM15,000 to appellant subject to allocator.

Reported by Dzulqarnain Ab Fatar